No. 88-776

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ARKANSAS STATE PROSECUTOR GENE RAFF, DEPUTY PROSECUTOR DAVID CAHOON, AND ARKANSAS LEE COUNTY CIRCUIT JUDGE HENRY WILKINSON, JR., IN THEIR OFFICIAL CAPACITIES ONLY,

Petitioners,

vs.

ROY C. LEWELLEN, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Roy C. Lewellen, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Sometime in May, 1984, Respondent Roy C. Lewellen, a black attorney, was retained to defend Reverend Almore Banks against a charge of raping the eleven year old daughter of Lafayetta Patterson. (T. 397-398). On September 3, 1985, jury selection began in the Banks trial. During the prior week, however, there had been intensive plea negotiations between Lewellen and petitioners, Raff and Cahoon. The plea offers ranged from "no jail time" to "jail time washing cars" to the last offer of "ten years suspended sentence." (T. 441). The day trial began, Raff and Cahoon informed Mrs. Patterson that the State's case had certain weaknesses – lack of medical proof and a defective information – that might be difficult to overcome. (T. 627-633).

Simultaneous with the plea negotiations, and for some time before, Mrs. Patterson had been telling Cahoon that her husband, Joe Patterson, and his relatives were pressuring her to terminate the prosecution by "dropping the charges." Mr. Patterson was the stepfather of the victim and the brother of Margie Banks, the wife of Almore Banks. (T. 9, 34-35).

Lewellen first learned of Mrs. Patterson's reputed desire to "drop the charges" on September 4, 1985, when he was informed by Margie Banks, and was told to go to the office of Olly Neal, the only other black attorney in Marianna, Arkansas. Neal was a black attorney retained by Mrs. Patterson to resist Lewellen's motion for a psychological examination of her child. (T. 405-410; 444). At Neal's office, Lewellen told Neal that he understood Mrs. Patterson wanted to drop the charges. Neal told Lewellen

that he knew nothing about it, but would go to the prosecutors if Mrs. Patterson informed him she did not want to proceed. (T. 444-445; 616-619). After talking to Mrs. Patterson alone, Neal told Lewellen and Mr. Patterson that Mrs. Patterson did not want to drop the charges. (T. 445, 659). Lewellen said nothing and went back to court. (T. 446).

Later, during the noon recess of the Banks trial, Lewellen received a call from Mr. Patterson in his office and was told that Mrs. Patterson had talked to her daughter and that the daughter did not want to pursue the case and "that [Lafayetta Patterson] wanted to see Al and Margie." (T. 447). Mrs. Patterson then told Lewellen that her daughter wanted to drop the charges and asked to see Margie and Almore Banks "face to face". Prior to speaking with Mrs. Patterson, Lewellen advised her that anything she said to him could be used in court. (T. 206; 447-448).

Lewellen transported Almore Banks and his wife to the Patterson home. He left them there with Robert Banks (Almore's brother), Mr. Patterson, and Mrs. Patterson. (T. 449-450). The meeting concluded with Almore Banks agreeing to leave town and Mrs. Patterson agreeing to drop the charges. Lewellen returned to pick up Almore Banks and declined to listen to an account of the meeting. 843 F.2d at 1106 (T. 207-208; 452).

Mrs. Patterson called Neal after the meeting and told him that she wanted to drop the charges. Neal told her he would call her back. Later, Mrs. Patterson told Neal that "Almore was looking in her mouth" when she told him that she wanted to drop the charges. (T. 75, 621, 728-730).

She did not tell Neal that she had lied to her husband and relatives about her intentions, nor that she had been in contact with Cahoon and Sheriff May regarding alleged harassment and pressure from her family. (T. 731-732; 670-671; 76-77). Neal, however, had previously told Mrs. Patterson that if her husband pressured her about dropping the charges he would not intervene. Also, he had informed her that he would take action if Almore Banks confronted her. (T. 611-613).

The next day, Neal called Cahoon and related the contact Mrs. Patterson had with Almore Banks and suggested a meeting with her. (T. 680). Unknown to Neal, Mrs. Patterson had already been in contact with Cahoon and Sheriff May at the jail. (T. 731-732, 37-39). May had called the state police and requested electronic surveillance assistance. State Trooper Williams arrived with the equipment before Mrs. Patterson arrived. (T. 334, 762, 879). Upon arrival, Mrs. Patterson told Williams that Almore Banks had offered her a sum of money, his wife's home, and "that Mr. Banks would leave Marianna forever . . . ," if she dropped the charges. (T. 888). Mrs. Patterson was served with a witness subpoena and asked to wear a body microphone. (T. 1078, 329). Neal was then called. (T. 41). Neal arrived and informed Cahoon, May, and Williams that he thought it was inappropriate for Banks to have confronted Mrs. Patterson at her house. (T. 692). Mrs. Patterson was fitted with the microphone. She was told to be sure to get Margie and Almore Banks to repeat their offers. (T. 82, 694-695). It was believed by Cahoon, May, and Williams that if she contacted her husband, contact would be made with Almore Banks and Lewellen. (T. 385, 895). The conversations would be recorded by

May, Williams, and Cahoon, who would follow Mrs. Patterson in the sheriff's car. (T. 342).

At her house, Mrs. Patterson told Mr. Patterson she "was tired" and would "drop the charges" if Almore Banks would leave town and her legal fee of $500 was reimbursed. She also demanded that a "paper" be drafted by a lawyer to reflect his agreement to leave town. (T. 1268). Inexplicably, this conversation was not recorded.

Mr. Patterson, after learning of Mrs. Patterson's new demands, called Robert Banks and related the demands to him. (T. 1281). This conversation was partially recorded and appears on the tape out of sequence. (T. 1271, 1281-1282). Mr. Patterson then called Almore Bank's home and talked to his sister, Margie, because Almore was at his church. He related to Margie what Mrs. Patterson wanted. This conversation is not on tape. Mr. Patterson then talked to Almore Banks, and related the same information to him. He then talked to Margie Banks again. The tape made at defendant Patterson's home and alleged to be the original has conversations out of sequence, conversations missing, and incomplete conversations. (T. 1212, 1346, 1271-1277; Pet. App. A47).

Almore Banks indicated he wanted Lewellen to draft the "paper" and would not deal with Neal when she suggested the latter (although she knew he was at the sheriff's office). (T. 1280). Mrs. Patterson left home and returned to the jail. (T. 102). She spoke to Cahoon who instructed her to proceed to Lewellen's office. (T. 1003; 793).

Lewellen was in his office when he received a call from Almore Banks. Almore Banks informed Lewellen

that Mrs. Patterson wanted to drop the charges and that he was coming to his office. (T. 454-455). Shortly thereafter, Almore Banks reached Lewellen's office and explained that Mrs. Patterson wanted him to draft a "paper" setting forth an agreement that he would leave town. Lewellen explained to his client that he could not draft such an agreement nor would he let him agree to sign such a document (T. 455)

Mrs. Patterson arrived at Lewellen's office. Lewellen took her into his inner office and again cautioned her about talking to him. (T. 459).

Lewellen, believing Mrs. Patterson was sincere, spoke frankly with her, expressing his fear of retaliation by Gene Raff because of his aggressive representation of Almore Banks, and his fear that Raff would tape his conversations using an informer. *Lewellen v. Raff*, 843 F.2d 1103, 1107 N.4 (T. 460-462). After Mr. Patterson, Almore Banks, and Margie Banks arrived and joined the conversation, there was another discussion of the offer Mrs. Patterson had made and the agreement by Almore Banks to leave town. Robert Banks had already agreed to reimburse the $500 legal fee. There was no other discussion of money, and no discussion about signing over the house that Almore and Margie lived in (T. 464-465; Id.).

Williams took the tapes to May's home and played the tapes for Raff, Cahoon, and May. The group then went to Cahoon's law firm and "rehashed" the evidence into the "wee" hours of the morning. (T. 936-938). The tape was also transcribed. (T. 841). Raff told Williams that he would feel better "if they had a clarification of the expression of 'drop the charges.'" (T. 939). He ordered

another taping of Lewellen. 843 F.2d 1107 - 1108 (T. 939, 352).

The following day, Williams met Mrs. Patterson and took a written statement from her. Lewellen, in court, received a message marked 'urgent' from the sheriff's secretary, containing Mrs. Patterson's telephone number. (T. 420-422; 134). Although he did not recognize the telephone number, Lewellen called and spoke to Mrs. Pattterson. She indicated to Lewellen that Neal was not assisting her and that she was receiving no cooperation from Raff and Cahoon in dropping the charges. Lewellen advised her to get another attorney and recommended Attorney L. T. Simes. Lewellen believed that Mrs. Patterson sincerely wanted to terminate the prosecution and was receiving no cooperation. In the course of the conversation, Lewellen attempted to explain her rights as the mother of the child victim. (T. 472-475).

On September 9, 1985, the Bank's trial resumed with jury selection. Immediately, however, Raff and Cahoon informed Judge Yates of the bribery investigation. After a hearing wherein Williams and Mrs. Patterson testified, a mistrial was declared. Lewellen was neither permitted to cross-examine nor to call witnesses. 843 F.2d 1108. And the court refused his request for counsel.[1] On the same day, May and Williams interviewed L. T. Simes and requested him to sign a statement that Lewellen had "requested Mr. Simes to ask her [Mrs. Patterson] to sign a document which would state that he [Lewellen] had never had contact with Mrs. Patterson." Simes declined

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[1] See Addendum to Respondent's Brief on Appeal, pp. 61-62, 67-70, 71-73, 105. (Transcript of Special Hearing).

to sign the statement. (T. 372). Instead, he recorded his recollection that Lewellen asked him to draft a document reflecting that Lewellen had not initiated contact with Mrs. Patterson. (Addendum to Respondent's Brief on Appeal, pp. 136-137, 169-170).

Several days after the taping, Williams and May interviewed Mr. Patterson. (T. 385). During the interview, Mr. Patterson felt threatened with a charge of bribery and was told "to look out for yourself." Nonetheless, he told May and Williams that he knew of no bribery, that the $500 was requested by Mrs. Patterson, and that Lewellen never offered any money to her. (T. 264; 377). On September 24, 1985, Williams and May recorded an interview with Neal who informed them that Lewellen never attempted to talk to him about the case, nor ever mentioned "passing any money." He did not implicate Lewellen in any wrongdoing or improper conduct towards his client, Mrs. Patterson. (Addendum, 171-178).

On September 27, 1985, May executed an affidavit in support of an information charging Lewellen and Almore Banks with witness bribery and conspiracy to commit witness bribery. 843 F.2d 1108.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct and does not conflict with decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners suggest that this Court should grant review of the decision below because the Eighth Circuit Court of Appeals crafted a new rule with regard to applying the *Younger* abstention doctrine. According to petitioners, the new rule permits a criminal defendant to preliminarily enjoin an ongoing state prosecution by simply establishing that the prosecution was "motivated 'in part' by an allegedly improper retaliatory purpose." *Petition* at 7. Petitioners suggest that such a standard does not require consideration of whether there is a reasonable expectation of obtaining a valid conviction and, thus, the courts below did not consider the strength of the state's case against Lewellen.

Petitioners assert that the "new rule" is a truncated version of the test employed by the Fifth Circuit in a suit to enjoin a criminal prosecution brought in retaliation for or to deter the exercise of constitutionally protected rights. Petitioners do not claim, however, that the Fifth Circuit test is inconsistent with or in conflict with the *Younger* abstention doctrine, nor with other circuit decisions. Rather, petitioners suggest that the Fifth Circuit test is erroneously applied by the Court of Appeals because it did not consider the strength of the evidence and the seriousness of the charges. Moreover, petitioners assert that the Fifth Circuit test requires a plaintiff to establish that retaliation was a *major motivating factor* in the state prosecution rather than being motivated *in part* by retaliation.

2. In *Younger v. Harris*, 401 U.S. 37, 53, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), this Court firmly established that federal injunctive relief against state criminal proceedings is available only where a plaintiff demonstrates great

and immediate irreparable injury in the form of a bad faith prosecution, harassment, or other extraordinary circumstances. In a companion case, *Perez v. Ledesma*, 401 U.S. 82, 85, 27 L.Ed.2d 701, 91 S.Ct. 679 (1971), the Court explained that a bad faith prosecution was one instituted "without hope of obtaining a valid conviction . . . ." *Kugler v. Helfant*, 421 U.S. 117, 124, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975). The Eighth Circuit Court of Appeals, as well as other circuits, recognizes that a significant component of a bad faith prosecution is the "lack of a reasonable expectation that valid convictions will result." *Central Ave. News, Inc. v. City of Minot, N.D.*, 651 F.2d 565, 579 (8th Cir. 1981); *Munson v. Janklow*, 563 F.2d 933, 935 (8th Cir. 1977); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1022 N.14 (3rd Cir. 1981); *Timmerman v. Brown*, 528 F.2d 811, 815 (4th Cir. 1975).

The Fifth Circuit Court of Appeals, however, has taken the lead in developing a test applicable to a bad faith prosecution which is brought under a valid statute for constitutionally impermissible reasons. As to federal actions to enjoin a state criminal prosecution brought in retaliation for or to deter the exercise of constitutionally protected rights, the Fifth Circuit held:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a

> preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

This test was set forth in *Wilson v. Thompson*, 593 F.2d 1375, 1383 (8th Cir. 1979). Therein, the Fifth Circuit reasoned that, in an action to enjoin a bad faith prosecution, as opposed to a good faith prosecution brought under an allegedly invalid statute, proving a bad faith prosecution is equivalent to proving irreparable injury. *Id.* at 1382; *Shaw v. Garrison*, 467 F.2d 113, 120, (5th Cir.) *Cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972); *accord: Collins v. County of Kendall, Ill.*, 807 F.2d 95 (7th Cir. 1986). Thus, contrary to petitioner's suggestion, it is irrelevant whether or not Lewellen can raise his bad faith prosecution claim as a defense in the state criminal proceedings. *Wilson v. Thompson, supra*, at 1385, N.17; *Council for Periodical Distributors Ass'n v. Evans*, 642 F.Supp. 552, 565-566 (M.D. Ala. 1986). Moreover, as the Court of Appeals indicated, the Fifth Circuit did not graft onto the traditional prerequisites for a preliminary injunction additional components derived from the Court's decision in *Younger*. Rather, the Fifth Circuit reconciled the traditional test for injunctive relief by incorporating the narrow exceptions to the abstention doctrine into the traditional requirements that a plaintiff demonstrate irreparable injury and likelihood of success. 843 F.2d 1113; *Wilson v. Thompson*, 1384-1385; *Smith v. Hightower*, 693 F.2d 359, 369 N.25, 370, N.27 (5th Cir. 1982); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982). This is entirely consistent with *Younger*, but contrary to the suggestion of the petitioners that respondent had to

satisfy the traditional preliminary injunction standard, as well as jurisdictional prerequisites under *Younger*.

Thus, the test constructed by the Fifth Circuit requires consideration of whether there is a reasonable expectation of a valid conviction, i.e., the State's evidence, in regard to proving irreparable injury and the likelihood of success on the merits. The Fifth Circuit test, however, does not require a showing that a valid conviction could not conceivably be obtained. *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir. 1981), *Cert. Denied*, 452 U.S. 916 (1982). In crafting the test and allocating the burden of proof, the Fifth Circuit looked to this Court's decisions in cases involving other forms of retaliation against plaintiffs for the exercise of constitutionally protected conduct, and to those cases establishing tests for determining whether a state decision was motivated by a discriminatory purpose. *Wilson v. Thompson* pp. 1386-1387. *See: Mt. Healthy City Board of Education v. Doyle* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Village of Arlington Hgts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Clearly, the Fifth Circuit test applied by the Court of Appeals and District Court below is grounded on sound precedent and employs principles that are well settled in analogous cases.

Petitioners suggest that the Fifth Circuit test was not followed faithfully by the Eighth Circuit in this case, and, as a consequence, applied a test which is less stringent and permits the *Younger* doctrine of abstention to be circumvented. Petitioners misapprehend the analysis of the Fifth Circuit which undergirds the *Wilson* test and "confuses the allocation of the burden of proof with the sufficiency of the evidence to carry the burden," *Smith v.*

Hightower, 693 F.2d at 367; CF: *Petition* at 7. In *Smith v. Hightower,* the Fifth Circuit made it clear that the "at least in part" language did not lighten the heavy burden on the plaintiff to demonstrate retaliation. Rather, the use of such language in *Wilson,* was intended to establish the quantum of evidence "necessary to establish the likelihood of success on the merits" on a request for a preliminary injunction, as opposed to establishing "actual success," which is required for a permanent injunction. *Id.* at 367, N.19. Even under that language a plaintiff must still "prove retaliation was a major motivating factor and played a prominent role in the decision to prosecute." *Id. See also: Gates v. City of Dallas,* 729 F.2d 343, 346 (5th Cir. 1984). In *Smith v. Hightower,* the Fifth Circuit reversed the grant of an injunction because the district court failed altogether to consider "evidence of crimes and wrongdoing" by the plaintiff. *Id.* at 370. In the case *sub judice,* the Court of Appeals was correct in sustaining the preliminary injunction, for it is clear on the record that the District Court below considered the evidence that allegedly incriminated Lewellen.

3. Indeed, petitioners do not assert that the District Court failed to apply the three-prong test of *Wilson* and *Smith v. Hightower.* It is very apparent that the District Court made explicit and specific findings that: a) the conduct retaliated against or sought to be impeded was constitutionally protected; b) that the criminal proceeding initiated by petitioners was brought in bad faith to retaliate against Lewellen for exercising federally protected rights; and c) that the criminal charges would not have been filed absent the desire to retaliate against Lewellen. (Pet. App. A45-A46).

The District Court specifically concluded that Lewellen had demonstrated that petitioners had no expectation of a valid conviction and, therefore, there was a "substantial likelihood that Lewellen will prevail on the merits." *Id.* In making that determination, the District Court discussed the probative value of the sole evidence that petitioners offered in support of the charges of witness bribery – the surreptitious taping of Lewellen – and found it wanting. (Pet. App. A46-A47). This conclusion rests on subsidiary factual findings, i.e. the condition of the tapes, an admission by Petitioner Raff that the initial tapes were insufficient as evidence of bribery under the state statute, and testimony of several witnesses, including petitioner's expert, that it is a common practice in Arkansas for lawyers "to serve as intermediaries in seeking to have criminal charges 'dropped' or nol prosed.' " (Pet. App. A47-A48).

Indeed, the District Court could have made other findings that supported its conclusion that the charges were instituted without an expectation of a valid conviction. It is clear from the face of the Arkansas witness bribery statute that it does not include as an offense efforts to have charges "dropped" or prosecutions terminated. 843 F.2d 1107 N.5. Petitioners are unable to cite (and the District Court did not hear) any evidence to support the claim that Lewellen was seeking to influence the testimony of Mrs. Patterson or to induce her to avoid legal process or to defy a subpoena. Petitioners' sole evidence proffered in this regard is the excerpt from the last taping. *Petition* at 22. Petitioners, however, fail to point out that, in that conversation, Mrs. Patterson lied to Lewellen about her desire to terminate the prosecution as

well as the lack of cooperation by her attorneys and petitioners, and that Lewellen referred her to another attorney for assistance. (T. 473-474). Moreover, there was substantial evidence that Lewellen advised her continually to work through her attorney, Olly Neal. (T. 444-445,616, 452-453, 460-465). Petitioners' assertion that "Lewellen admitted he negotiated a secret agreement whereby Mrs. Patterson would be paid $500 in exchange for her agreement to 'drop the charges' " is a disingenuous mischaracterization of the record. *Petition* at 21. It is clear from the tape itself as to why Lewellen expressed caution with regard to his involvement in the meeting in his office. He had a well-grounded fear based on racial history, political corruption in Eastern Arkansas, and his experience in the Banks trial that Raff would accuse him of intimidating, bribing, or tampering with a witness. 843 F.2d 1107-1108, N.4. From all the circumstances and evidence, it is clear that Lewellen was only attempting to assist Mrs. Patterson in her reputed desire to terminate the charges. Lewellen's conduct was clearly outside the scope of the Arkansas witness bribery statute.

Contrary to petitioner's claim, the District Court did find that the prosecution of Lewellen was motivated by his race and was consistent with the disparate treatment black attorneys received in the Lee County court system. (Pet. App. A44-A45). On that issue, the District Court cited Lewellen's treatment during the Banks trial, and the suggestion by Sheriff May that Lewellen apologize to Raff to minimize the consequences of the criminal charges. *Id.* The District Court also heard testimony during the first hearing on a temporary restraining order that Petitioner Cahoon frequently used derogatory racial slurs

towards and in the presence of black attorneys, a fact confirmed by a law partner of Cahoon. (Addendum to Brief on Appeal, 193, 221-223, 235-237, 38). The record before the courts below also included deposition testimony of four black attorneys regarding discriminatory treatment by Raff and judges in appointments, professional and judicial discipline, plea bargaining, and jury selection, as well as Raff's extraordinary influence over the judicial system. (*Id.*, 132, 134, 140-141, 146, 636, 644, 203, 205, 240-247).

Similarly, the testimony of Lewellen and Sam Blount provided direct evidence in support of the finding that the prosecution was also motivated by Lewellen's vigorous defense of his client. Together with the unfair treatment of Lewellen during the Banks trial, the weakness of the State's case against Banks, and the circumstances surrounding the alleged investigation of Lewellen, such evidence was more than sufficient. Indeed, in view of petitioner's failure to testify or to otherwise present countervailing evidence, the District court was compelled to so find.

Finally, the District court found the scheduling of Lewellen's trial in the state proceeding during his candidacy for state office significant and supportive of Lewellen's allegation that the prosecution was undertaken, in part, to retaliate against him for his candidacy. (Pet. App. at A45, N.5).[2] the District Court, however, also opined that, at a trial on the merits, Lewellen would be able to further establish the nexus between his prosecution and his candidacy for state office, including the

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[2] See also: A40-A41 and notes thereunder.

relationship between Raff and Lewellen's political opponent. (*Id.*). It had before it evidence relevant to campaign harassment by state and local officials and to campaign propaganda by his political opponent regarding the pending prosecution. (Addendum to Brief on Appeal, pp. 215-219).

4. Petitioners are correct that the Court of Appeals did not discuss the issue of whether or not there was a reasonable expectation of obtaining a valid conviction of Lewellen in the first opinion. 843 F.2d 1112. It is clear, however, that the Court of Appeals reviewed that aspect of the District Court's decision in response to petitioners' first petition for rehearing. In its second opinion, the Court of Appeals specifically found that the District Court "reviewed the evidence of Lewellen's allegedly criminal activities at length and specifically concluded that there was a substantial likelihood that Lewellen would establish that the prosecutor 'had no reasonable expectation of getting a conviction of Lewellen'." *Lewellen v. Raff*, 851 F.2d 1108, 1110 (8th Cir. 1988).

The Court of Appeals also explained its failure to address that issue in its first opinion and its finding that the prosecution was "motivated in part by a purpose to retaliate against constitutionally protected conduct." It was held that, in the context of a preliminary injunction, Lewellen was not required to "show that 'but for' the desire to retaliate the charges would not have been brought." *Id.* The analysis of the Court of Appeals is consistent with *Wilson* and *Hightower* in every respect and reflects the difference between the quantum of proof necessary to obtain a preliminary injunction as opposed to a permanent injunction.

Indeed, if Lewellen had been required to satisfy the "but for" test within the limited confines of a hearing on a preliminary injunction, it would have been clear error. It is firmly established that a party is entitled to notice that permanent rather than temporary relief is being determined. *Capital City Gas Company v. Phillips Petroleum Company,* 373 F.2d 128 (2nd Cir. 1969). The District Court repeatedly informed the parties during the hearing on the preliminary injunction that it was not a trial on the merits. (Pet. App. at A45, N.5; also, T. 5, 8).

5. Finally, petitioners suggest that, for policy reasons, this Court should review the case *sub judice.* Petitioners argue that the impact of a preliminary injunction is the same as a permanent injunction. Essentially, it is asserted that *any* federal interference with a state criminal proceeding cripples the ability of the state to prosecute a plaintiff seeking relief from a bad faith prosecution under exceptions to the *Younger* doctrine. A preliminary injunction, petitioners suggest, depreciates the evidence, assures the abandonment of the prosecution, permits discovery not allowed under the state rules of criminal procedure, and diminishes the prospect of conviction. *Petition* 12-13.

The value of such claims as these are almost rhetorical. Clearly, every judicial proceeding of record preserves rather than destroys evidence by its very nature. More importantly, as the Court of Appeals noted, the *Younger* abstention doctrine "is based on comity and federalism," and a state has no legitimate interest in pursuing a bad faith prosecution. 843 F.2d at 1110; *Lewellen v. Raff,* 649 F.Supp. 1229, 1234 (E.D. Ark., 1986); *Wilson v. Thompson,* at 1383. It is clear that, in this case, the sole evidence

offered by the state as allegedly incriminating Lewellen on the charges of bribery comprises one statement by Lewellen, taken out of context, which is preserved on tape. For whatever it is worth, that evidence is forever preserved for all practical purposes.

The policy argument advanced by petitioners would lead to the elimination of preliminary relief and appellate review under 28 U.S.C. 1292. Petitioners' rationale would require a full trial on the merits on every well plead claim of bad faith prosecution under the *Younger* exceptions, if such exceptions are to survive. Otherwise, district courts would be constrained to dismiss every claim, effectively destroying the narrow, but necessary exceptions to the *Younger* doctrine of abstention.

Obviously, the petitioners' cure would kill the patient.

CONCLUSION

The Courts below had ample evidence on which to base a finding that the prosecution of Respondent Roy C. Lewellen was instituted in bad faith without a reasonable expectation of a conviction. The District Court conscientiously applied the Fifth Circuit test announced in *Wilson* and *Smith v. Hightower*. Upon review, the Court of Appeals correctly held that the District Court's findings were not clearly erroneous and supported the issuance of a preliminary injunction. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Moreover, on the petition for rehearing, the Court of Appeals specifically held that the District Court had considered whether the prosecution was instituted with a reasonable expectation of a conviction. Clearly, the Court

of Appeals did not modify the *Wilson* test, nor lessen the burden on Lewellen to prove a bad faith prosecution. Indeed, petitioners failed to carry their burden of demonstrating that they would have reached the same decision to prosecute had the retaliatory motives not been considered. *Wilson v. Thompson* at 1387.

The Court of Appeals' decision does not conflict with decisions of this Court or other circuit courts. And petitioners have not demonstrated a need for this Court to extinguish the distinction between preliminary and permanent injunctions in suits brought under the limited exceptions to the *Younger* abstention doctrine.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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